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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BRENDA BARR, et al., Plaintiffs and Appellants, v. PETER LAKATOS, et al., Defendants and Respondents.	B177003 (Los Angeles County Super. Ct. No. BC290779)

APPEAL from the judgment of the Superior Court of Los Angeles County, George H. Wu, Judge. Reversed.

Samuel J. Wells, A PC, Samuel J. Wells; King & Hanagami, Michael P. King and William K Hanagami for Plaintiffs and Appellants.

Ballard Rosenberg Golper & Savitt LLP, Linda Miller Savitt, Adrian J. Guidotti for Defendants and Respondents.

INTRODUCTION

Plaintiffs and appellants Brenda Barr (plaintiffs or Barr), Gabriela Kennedy and Renee Luke[1] brought an action against their employer "City of Los Angeles by and through the Department of Water and Power" (City or DWP), and other DWP employees,

[1] Another plaintiff was not a party to this appeal.

Peter Lakatos, Albert Magwene (defendant or Magwene) and Michele Nagin (collectively individual defendants) for discrimination, harassment and retaliation. The trial court sustained a demurrer, without leave to amend, as to three causes of action in a Fourth Amended Complaint remaining against the individual defendants. Plaintiffs appealed as to two causes of action, contending that the trial court erred in concluding that individual supervisors cannot be held personally liable for retaliation in violation of Government Code section 12940, subdivision (h), which provision is part of the California Fair Employment and Housing Act (FEHA).[2] All claims were resolved after the appeal was filed, except for the claims of Barr against Magwene.

We hold that a supervisor can be held personally liable for retaliation in violation of FEHA; that Barr has pleaded sufficient facts of an adverse employment action by Magwene; and the claims are not barred by the immunity provisions of section 820.2. Thus, the order sustaining the demurrer of Barr against Magwene is reversed.

FACTUAL BACKGROUND

Plaintiff Barr, in her Fourth Amended Complaint, alleges that she was an employee of DWP and that defendant Magwene was or had been director of Labor Relations for DWP; that the DWP was "permeated with discriminatory animus" against women and African Americans; that as a result, plaintiff suffered discrimination and harassment based on pay, classification, and other employment actions; that plaintiff complained to the defendants, including Magwene about the discrimination and harassment and that defendants, including Magwene, retaliated against plaintiff for her complaints. The individual defendants demurred. The trial court sustained the demurrers on the grounds that "[t]he totality of the allegations . . . do not rise to the level of actionable conduct as a matter of law . . . ." At the hearing on the demurrers, the trial court stated that supervisors are not liable for retaliation. Plaintiffs appealed as to the

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[2] All statutory references are to the Government Code unless specifically identified otherwise.

dismissal of the Fifth and Eighth causes of action for retaliation. All claims were resolved, except Barr's claims against Magwene.

Plaintiff, in her opening brief states, "the only issue raised by this appeal is whether a supervisor can be held personally liable for retaliation in violation of the California Fair Employment Housing Act (FEHA)." Plaintiff adds, however, that she should be granted leave to amend to assert claims of violation of Labor Code section 1102.5, which protects retaliation against employees who report violations of law.

Defendant contends that plaintiff has failed to allege facts sufficient to state her two FEHA retaliation causes of action because she does not allege any adverse employment action sufficient to support a retaliation claim, and that even if there were sufficient allegations of adverse employment actions, individual supervisors cannot be liable personally for the alleged conduct. Defendant also contends he has discretionary immunity under section 820.2. Defendant argues that plaintiff should not be able to amend because she cannot state a cause of action under Labor Code section 1102.5, for that provision only applies to the employer, not to employees of the employer.

DISCUSSION

A. Standard of Review

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, "we take the properly pleaded material allegations of [plaintiff's fourth amended complaint] as true; our only task on review is to determine whether the [fourth amended] complaint states a cause of action." (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1253. As to the trial court's determination to grant the demurrer without leave to amend, "we must decide whether there is a reasonable possibility that plaintiff[s] could cure the defect with an amendment. [Citation.]. If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff[s] [have] the burden of proving that an amendment would cure the defect. [Citation.]" (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

We may affirm a judgment of dismissal entered upon the sustaining of a demurrer without leave to amend even though the trial court's theory was incorrect, so long as the complaint does not state a cause of action. (*Brown v. State of California* (1993) 21 Cal.App.4th 1500, 1506 [sustaining of demurrer "'will be upheld on any sufficient ground, whether relied on by the court below or not'"], disapproved on another ground in *Massingill v. Department of Food & Agriculture* (2002) 102 Cal.App.4th 498, 506-507; *Lee v. Bank of America* (1990) 218 Cal.App.3d 914, 918-919; *Blue Chip Enterprises, Inc. v. Brentwood Sav. & Loan Assn.* (1977) 71 Cal.App.3d 706, 712.)

B. Supervisors' Liability for Retaliation

The trial court determined that as supervisors, the defendant could not be liable for claims of retaliation. One noted authority has stated that this issue is an "important" one "because the distinctions between discrimination, harassment and retaliation are not always clear . . . ." (1 Chin, Cathcart, Exelrod, Wiseman, California Practice Guide, Employment Litigation (2004) § 7.07, p. 7-79 (Chin).)

Section 12940 of FEHA makes unlawful certain employment practices. Section 12940, subdivision (a) prohibits "an employer" from making discriminatory personnel actions. Section 12940, subdivision (h) prohibits harassment by an "employer . . . or any other person" because of race, sex and other specified classifications. Section 12940, subdivision (j) specifically makes an "employee of an entity subject to this subdivision" and "personally liable for any harassment prohibited by this section that is perpetrated by the employee." (§ 12940(j)(1)(3).) "[A]ny employer . . . or person" is prohibited from retaliating against someone for opposing or complaining about acts prohibited by FEHA. Acts prohibited by FEHA may result in liability (§§ 12965, 12970, 12987.) (See *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 472.)

In *Reno v. Baird* (1998) 18 Cal.4th 640 (*Reno*), the Supreme Court held that supervisory employees are not subject to personal liability for discrimination prohibited by section 12940, subdivision (a). This subdivision refers only to "an employer," as contrasted with subdivision (h), which prohibits harassment by "an employer . . . or any

other person." The court approved of the rationale of *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55 (*Janken*) as to the reasons for the distinction: " 'the Legislature's differential treatment of harassment and discrimination is based on the fundamental distinction between harassment as a type of conduct not necessary to a supervisor's job performance, and business or personnel management decisions—which might later be considered discriminatory—as inherently necessary to performance of a supervisor's job. [Citation.] The court noted that 'harassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives.'" (*Reno, supra,* 18 Cal.4th at pp. 645-646.)

The court in *Reno, supra,* 18 Cal.4th at pages 650-651, 662-663, noted that the FEHA exempts employers with less than five employees from liability for discrimination but does not do so in connection with harassment claims. (§§ 12926, subd. (d), 12940, subd. (h)(4)(5).) The court said it made no sense to exempt small employers from liability for discrimination but not their employees. The court concluded, "By limiting the threat of lawsuits to the employer itself, the entity ultimately responsible for discriminatory actions, the Legislature has drawn a balance between the goals of eliminating discrimination in the workplace and minimizing the debilitating burden of litigation on individuals." (*Reno, supra,* 18 Cal.4th at p. 663.)

A number of courts have concluded supervisors can be liable for retaliation under FEHA because the Legislature included in section 12940, subdivision (h) the term "person" as those who are forbidden from retaliation, and "person" is defined to include "one or more individuals." (§ 12925, subd. (d); see, e.g., *Walrath v. Sprinkel* (2002) 99 Cal.App.4th 1237, 1242; *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1288 (*Winarto*); *Liberto-Blanck v. City of Arroyo Grande* (C.D. Cal. 1999) 33 F.Supp.2d 1241, 1244; *Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1211-1212.) As one authority has written, "Under the FEHA, a supervisor may be individually liable for retaliatory termination. In *Winarto,* the Ninth

Circuit concluded that the plain meaning of FEHA's retaliation provision is susceptible to only one interpretation: supervisors are 'persons' and potentially liable for retaliation. The court distinguished the holding in *Reno v. Baird*, that supervisors cannot be personally liable for discrimination under FEHA, since Gov. Code section 12940(a) prohibits only 'an employer' from discriminating in hiring and employment decisions." (2 Wilcox, California Employment Law (2005) § 41.130[5], pp. 41-470-41-471.) As another writer noted, "Since the Legislature added the term 'person' to the retaliation provision in 1987, every court discussing individual liability in the retaliation context has stated that individuals can be held liable." (Capozzola, "Individual Liability and Retaliation: Toward a Sensible Solution" (2004) 25 Berkeley J. Emp. & Lab. L. 401, 420 (Capozzola).)

Notwithstanding the use of the words "any person" in connection with prohibited harassment, the Supreme Court in *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1137-1138, held that a co-worker could not be held liable for harassment. The court in that case stated, "Plaintiff notes that another provision of the FEHA that prohibits improper retaliation also extends the prohibition to any 'person.' (§ 12940, subd. (f).) Some cases contain dicta suggesting that this language imposes personal liability on coworkers for retaliation. [Citations.] Plaintiff argues that the same rule should apply to harassment because of section 12940(h)(1)'s assertedly similar language. However, whatever rule might apply to retaliation (we express no opinion), the statutory language regarding retaliation contains no additional language comparable to the second sentence of section 12940(h)(1). We must construe section 12940(h)(1) in its entire context, not by reference to the quite different overall language of section 12940, subdivision (f)." As noted by one writer, "[b]eginning in 1996, . . . the courts began to limit the application of individual liability in order to promote certain policies." (Capozzola, *supra*, 25 Berkeley J. Emp. & Lab. L. at p. 420.)

One prominent authority stated as follows: "Supervisors and small employers will argue that since the Legislature clearly excluded small employers from discrimination claims while subjecting them to harassment claims, it seems 'incongruous' to argue that

the Legislature intended to subject them to retaliation claims. [¶] Moreover, there is no basis for *any* liability under the FEHA unless there is an 'unlawful employment practice' by the employer. [Citation.] [¶] Retaliatory acts by coworkers and supervisors (see ¶ 7:121, 7:680)—like discrimination and harassment—are attributable to the employer, and not actions for which individuals can be held liable under the FEHA. (Such individuals may be vulnerable to suit, however, under other tort theories or statutory provisions. [¶] It is difficult to comprehend why supervisors should be immune from personal liability for making *discriminatory* personnel management decisions, but potentially subject to personal liability for 'retaliation' for making the same type of decisions. [¶] . . .[¶] Employers and individual defendants may argue that the logic of *Reno* and *Janken*, above, provides an approach: Discrimination claims do not support individual liability because they stem from personnel decisions that are part of the business enterprise, whereas harassment claims stem from avoidable conduct of a personal nature. Individual liability for retaliation claims therefore should depend on the *type of conduct* involved (retaliatory discharge or retaliatory harassment); i.e., individuals should not be personally liable for retaliatory personnel decisions, such as discharge, but should be personally liable for retaliatory harassment." (Chin, *supra*, California Practice Guide, Employment Litigation §§ 7:706-7:707 at pp. 7-79-7-80.) It is this authority upon which the trial court relied.

It has been suggested that a "liberal interpretation" of FEHA could result in no individual liability for retaliation and that a "strict textualist court" would impose such liability even though it would lead to an "injustice." (Capozzola, *supra,* 25 Berkeley J. Emp. & Lab. L. at p. 427.) We believe that the word "person" as defined in the Government Code cannot be interpreted in any other way than to include a supervisor. If the provision results in "injustice" or is poor public policy, it is for the Legislature to address. In view of the unanimity of cases, including Court of Appeal cases, the trial court erred in not following that authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Accordingly, to the extent the trial court relied on the theory that supervisors cannot be liable for retaliation under FEHA, the trial court was incorrect.

C. Prima Facie Case for Retaliation

In order to state a cause of action for retaliation, i.e. plead a prima facie case, plaintiff must allege that she engaged in protected activities. (See *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476-478.) Plaintiff was thereafter subjected to adverse employment action by the employer (see post), and that there was a causal connection between the two. (*Chen v. County of Orange* (2002) 96 Cal.App.4th 926, 948-949; see *Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1453 (*Akers*); see *Miller v. Department of Corrections, supra,* 36 Cal.4th at p. 472.) Plaintiff has pleaded that she engaged in the protected activity by alleging complaints against discrimination. She has pleaded the causal connection by alleging that as a result of her complaints and as retaliation for their complaints, various acts took place. A principal issue is whether she has pleaded sufficient facts as to adverse employment actions.

D. Adverse Change in Employment

Under FEHA, an employee must show that he or she has suffered some "adverse employment action." (*Akers, supra,* 95 Cal.App.4th at. p. 1454.) The plaintiff must show that the employer's retaliatory actions "constitute a sufficient adverse employment action under the relevant standard (materially affecting the terms, conditions or privileges of employment)." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1060.) In *Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511, the court noted that "most [federal] circuits require that the action 'be more disruptive than a mere inconvenience or an alteration of job responsibilities,'" and echoed the First Circuit Court of Appeals's observation that "'[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.'" (*Ibid.)* The courts have resisted being injected into friction and dissatisfaction at the workplace. (*Akers, supra,* 95 Cal.App.4th at p. 1455.)

As noted in *Akers, supra,* 95 Cal.App.4th at page 1454, "[A]lthough there is scant authority in California defining the meaning of an adverse employment action under the FEHA, a plethora of federal courts have considered the issue in construing the analogous federal antidiscrimination statute, and have reached differing conclusions." There are three standards for defining an adverse employment action. As described in Chin, *supra,* §§ 7:770-7:790 at pp. 7-88-7-88.4, these consist of the strict position—ultimate employment decisions such as firing, demotion, reduction of pay and refusal to promote (*Mattern v. Eastman Kodak Co.* (5th Cir. 1997) 104 F.3d 702, 707; *Ledergerber v. Stangler* (8th Cir. 1997) 122 F.3d 1142, 1144); the intermediate position—actions affecting employment benefits or other terms and conditions of employment (*Robinson v. City of Pittsburgh* (3d Cir. 1997) 120 F.3d 1286, 1300; *Torres v. Pisano* (2nd Cir. 1997) 116 F.3d 625, 640); and the liberal interpretation—"any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity" (EEOC Compliance Manual Section 8, "Retaliation," ¶ 8008 (1998)) or whether a reasonable person in the same situation would view the action as adverse. (See *Vasquez v. County of Los Angeles* (9th Cir. 2003) 349 F.3d 634, 646.) In apparent support for the "liberal interpretation," the Supreme Court recently said, "The FEHA should be liberally construed to deter employers from taking actions that would discourage employees from bringing complaints that they believe to be well founded. The act would provide little comfort to employees, and thereby would fail in its ameliorative purpose, if employees feared they lawfully could lose their employment or suffer other adverse action should they fail to phrase accurately the legal theory underlying their complaint concerning behavior that may violate the act." (*Miller, supra,* 36 Cal.4th at p. 475.)

The California Supreme Court in *Yanowitz v. L'Oreal USA, Inc., supra,* 36 Cal.4th at p. 1036 adopted the intermediate position, holding that the "proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment [citation], rather than the arguably broader 'deterrence' test . . . ." The court said that in

that case, "[m]onths of unwarranted and public criticism of a previously honored employee, an implied threat of termination, contacts with subordinates that only could have the effect of undermining a manager's effectiveness, and new regulation of the manner in which the manager oversaw her territory did more than inconvenience [plaintiff]." (*Id.* at p. 1060.) The court concluded that by submitting these facts, the plaintiff "has met her burden of establishing an adverse employment action for purposes of her prima facie case." (*Ibid.*)

Plaintiff alleges her complaints about discrimination. And she alleges a host of retaliatory acts. Many of the alleged retaliatory acts do not specify the individual defendants and thus for purposes of determining the demurrer by defendant must be disregarded.

The following are the allegations by Barr against Magwene. In the Fifth and Eighth Causes of Action, Barr alleges that Magwene denied her request for an upgrade in Barr's pay classification; Magwene said Barr would never receive an upgrade because she was "crazy;" Magwene ordered a job audit or analysis of duties and responsibilities to determine Barr's qualifications for an upgrade; Magwene rewrote a report to block Barr's upgrade; Magwene disclosed private medical information about Barr to coworkers; Magwene caused Barr's computer to be monitored; Magwene deleted a position in Barr's unit, thereby increasing Barr's workload; Magwene caused notices of promotional opportunities to be delayed in reaching Barr, thereby hampering her ability to compete; the "hostile environment was also retaliatory in nature and created and tolerated by defendants DWP, Magwene and Lakatos."

Barr alleges retaliatory actions by Magwene that affected what would be promotions. "Where an employer reacts to a discrimination complaint by eliminating a reasonable potential for promotion or materially delaying the promotion, there is a legally tenable basis for a jury to find the employer substantially and materially adversely affected the terms and conditions of the plaintiff's employment." (*Akers, supra,* 95 Cal.App.4th at p. 1456).

The court in *Akers, supra*, 95 Cal.App.4th at page 1457, notes "that a mere oral or written criticism of an employee or a transfer into a comparable position does not meet the definition of an adverse employment action under FEHA. [Citations.] But . . . the issue requires a factual inquiry and depends on the employer's other actions." That does not mean that negative employment evaluations cannot, under the circumstances, be considered in determining whether there has been an adverse employment action under the FEHA. In *Yanowitz v. L'Oreal, supra,* 36 Cal.4th at pp. 1054-1055, the court in discussing "adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion [that] falls within the reach of [FEHA]" cites a federal case that includes "unwarranted negative job evaluation" as being covered by federal antiretaliation provisions. (*Id.* at p. 1055, fn. 15; *Wyatt v. City of Boston* (1st Cir. 1994) 35 F.3d 13, 15-16.) And in *Akers, supra,* 95 Cal.App.4th at p. 1457, the court said that, "[a]n unfavorable employee evaluation may be actionable where the employee proves the 'employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.'"

Many of the allegations individually relate to job conditions and not to the type of adverse employment action that current California authorities deems to be a FEHA violation. Although marginal, in drawing "reasonable inferences" from the allegations (*Coleman v. Gull Ins. Group* (1986) 41 Cal.3d 782, 789, fn. 3), there are causes of action stated by Barr against Magwene because of the allegations concerning retaliation actions taken that affected promotion. We emphasize that we are only holding that in our determination is as to a demurrer and that Barr's allegations against Magwene minimally state causes of action for retaliation under FEHA.

E. Discretionary Immunity

Magwene asserts that in exercising discretion, he was immune from liability under section 820.2. That section provides, "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused."

In *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 989 (*Caldwell*), the court held, "as a matter of law, the decision by members of an elected school board whether to renew the contract of the district's superintendent is a basic policy decision, and thus a discretionary act of the kind for which public employees are entitled to personal immunity under section 820.2 of the Tort Claims Act. By the terms of section 820.2, such personal immunity applies even against liabilities imposed by prohibitory state statutes of general application such as FEHA, unless there is a clear indication of legislative intent that immunity be withdrawn in the particular case. There is no indication of legislative intent that, notwithstanding the statutory immunity for discretionary acts, public employees may be personally sued for personnel decision which violate FEHA. Hence, that immunity must prevail, if otherwise applicable, over FEHA claims against public employees in their individual capacities."

In determining what is or is not discretionary, the court in *Caldwell, supra,* 10 Cal.4th at page 981 said, "almost all acts involve some choice among alternatives, and the statutory immunity thus cannot depend upon a literal or semantic parsing of the word 'discretion.'" (*Id.*) The court, in quoting from *Johnson v. State* (1968) 69 Cal.2d 782, 790, 793, stated that a "'workable definition'" of immune discretionary acts distinguished between "'planning'" and "'operational'" functions of government. Thus immunity applies to "'*basic policy decisions*'" but not to "'ministerial' decisions that merely implement a basic policy already formulated." Thus, according to the court, "have carefully preserved the distinction between policy and operational judgments." (*Id.* at p. 981.)

The Supreme Court has stated in *Barner v. Leeds* (2000) 24 Cal.4th 676, 684, that the defendants must show that the decisions are properly considered as "basic policy decisions made at the 'planning' stage of [the entity's] operations," rather than "routine duties incident to the normal operations" of the employee's office or position. (*Id* at p. 685.) The acts alleged here do not fit within the type of policy decisions that the Supreme Court determined would be immune under the statute. The decisions regarding routine pay increases and job performance evaluations may not be characterized as a "'quasi-legislative policy-making' decision which is 'sufficiently sensitive' to call for judicial abstention from interference that 'might . . . affect the coordinate body's decision-making process" of a coordinate branch of government. (*Id.*)

"'[I]n governmental tort cases, "the rule is liability, immunity is the exception."'" (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 792.) Accordingly, the alleged actions, at least as pleaded, are not the type that are immune as discretionary acts under section 820.2.

DISPOSITION

The order sustaining the demurrer of Brenda Barr against Albert Magwene as to the Fifth and Eighth causes of action in the Fourth Amended Complaint is reversed. The parties shall bear their own costs on appeal.

MOSK, J.

We concur:

ARMSTRONG, P.J.

KRIEGLER, J.